GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-084

MARYANNE TAGOE,
Claimant-Petitioner,

v.

HOWARD UNIVERSITY HOSPITAL,
Employer-Respondent.

Appeal from a June 5, 2013 Compensation Order on Remand By
Administrative Law Judge Amelia G. Govan
AHD No. 03-287, OWC No. 568310

Maryanne Tagoe, *pro se* Petitioner
William H. Schladt, Esquire for the Respondent

Before: JEFFREY P. RUSSELL, MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

This case has been the subject of numerous Compensation Orders, Decisions and Remand Orders from the Compensation Review Board (CRB), and Remands from the District of Columbia Court of Appeals (DCCA). We will not recount them all. Rather, we will address only those orders that are relevant to this appeal.[1]

This is an appeal from a Compensation Order on Remand (the COR) issued by an Administrative Law Judge (ALJ) in the hearings section of the Department of Employment Services on June 5, 2013. The COR was necessitated by virtue of the CRB having reviewed an earlier COR in this case, and having issued a Decision and Remand Order (DRO). In the DRO, the bulk of the earlier COR was affirmed. However, one matter that Dr. Tagoe claimed in that earlier appeal was

[1] The Application for Review makes reference to numerous issues and orders that were not the subject of the Decision and Remand Order. We assume that Dr. Tagoe makes these references for the purpose of preserving them for ultimate appeal to the DCCA.

that she had raised claims for travel reimbursement expenses for the calendar year 2009 when she presented her case at the formal hearing on held on June 3, 2003, and that the ALJ did not address those claims. On September 18, 2012, the CRB remanded the matter for the following limited purpose:

> We note that a formal hearing was held June 3, 2009, as noted in the February 18, 2011 COR. The ALJ did not address the question of whether travel reimbursement mileage claims for 2009 had been presented for resolution at that time, and thus we must again remand the matter so that the ALJ can review the record before her, including the pretrial submissions of the parties, the transcript of the formal hearing, and the evidentiary submissions of the Claimant and ascertain whether a claim for mileage reimbursement was made for the year 2009, and if so, make appropriate findings of fact concerning whether Claimant is entitled to an award for mileage reimbursement for that year, and if so, what the amount of that award should be.
>
> The remainder of Claimant's complaints concerning the inadequacy of the award is repetition of earlier arguments made and errors alleged to have been committed which were previously addressed, and will not be re-addressed here.

September 18, 2012 DRO, page 5.

On June 5, 2013, the ALJ issued the COR under review herein, in which Dr. Tagoe was awarded $69.48 for mileage and parking expenses incurred in 2009.

Dr. Tagoe filed an Application for Review (AFR) on July 5, 2013. However, the Certificate of Service included therein states that it was mailed to "Marlene Taswell [,] Claims Examiner for VA/DC Insurance Guaranty Association." No address for this person is given, and nowhere in the body of the AFR is there any indication of who or what Ms. Braswell or the VA/DC Insurance Guaranty Association (VIGA) are. Attached to the AFR received by the CRB is a photocopy of a letter purporting to be from a claims examiner from VIGA, Marlene Taswell, to Dr. Tagoe, suggesting that due to the insolvency of Lumberman's Mutual Insurance and Kemper Insurance, VIGA is now the insurer for this claim.

The Certificate of Service failed to indicate it had been served upon Howard University Hospital or their counsel of record, William H. Schladt, Esq.

In the AFR, Dr. Tagoe's "Argument" appears to be a complaint that the ALJ failed to follow the directives of the CRB in a prior DRO issued November 13, 2012, and Dr. Tagoe reiterates and repeats many of her previously raised complaints concerning interest rates, medical bills that she claimed are unpaid or co-payments she has made to which she claims entitlement to reimbursement. She takes issue with the ALJ's assertion that no claim for travel expenses for 2009 had been submitted until October 7, 2009, asserting that on June 16th, 2009, [11 days post-hearing] "ALJ Govan accepted into evidence … petitioner's expenses for the period January 7, 2009 until July 17th, 2009."

On July 15, 2013, Howard University Hospital (Howard), through Mr. Schladt, filed a Response to Application for Review (Response). The Response contained within it a Motion to Dismiss,

asserting that Dr. Tagoe had not served Mr. Schladt with the AFR, and had listed only "a company that is not handling the claim" as having been mailed a copy.

Further, the Response avers that counsel has never received the post-hearing submission, and that Dr. Tagoe's AFR suggests that the submission was for medical expenses only, not travel allowances.

Lastly, Howard argues that no award can be made for the claimed travel expenses, because evidence of their having been incurred has not been submitted.

Dr. Tagoe filed a reply to the Motion to Dismiss, asserting that "On May 8, 2013, Howard University Hospital's Insurance of Record for Claimant's case Kemper Insurance, which is a subsidiary of Lumberman's Mutual Insurance, was declared insolvent by the Cook County District Court in the State of Illinois", that DOES has been notified of this because the Director of Labor Standards "has been provided" a copy of the notice, and Dr. Tagoe attached a letter from VIGA to Dr. Tagoe indicating that it was now handling "certain claims" for Howard University, suggesting (but not stating explicitly) that hers was one such claim. Dr. Tagoe stated that she would no longer serve Mr. Schladt copies of future filings "until [he] duly represents the State Guaranty Association."

Howard's counsel Mr. Schladt subsequently filed Motion to Strike, asserting that VIGA has no connection to the case, that Mr. Schladt remains counsel of record for Howard, and seeking an order directing that Dr. Tagoe continue to serve all pleadings and documents in this case upon Howard through service upon Mr. Schladt.

We reverse the determination that Dr. Tagoe has shown entitlement to the award, vacate the award, and remand the matter for entry of an order denying the award for the reasons set forth in this Decision and Remand Order.

DISCUSSION AND ANALYSIS[2]

Turning first to the Motion to Dismiss the AFR and the Motion to Strike, we shall assume that Kemper and Lumberman's have been declared insolvent.

The record before us contains no cognizable legal indication as to what connection to this case, if any, Kemper and/or Lumberman's have now or had in the past.

That does not change the fact that Howard University Hospital is a party to these proceedings and that Mr. Schladt has entered his appearance on its behalf. Until such time as he or his firm is

[2] The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion.

stricken as counsel for Howard University Hospital, the rules of the agency require that he be served with all pleadings and filings.

Fortunately, it appears that he obtained copies of the AFR and was able to file a timely response on behalf of the employer. Thus, as of now, the failure to serve Mr. Schladt appears not to have resulted in prejudice to the ability to defend this particular AFR. The Motion to Dismiss is therefore denied. The Motion to Strike is granted, and Dr. Tagoe is advised that she is to serve all pleadings and papers filed with this agency in connection with this claim upon Mr. Schladt, and that such a lack of prejudice will not, in the future, be considered a mitigating factor, if a willful failure to serve papers, pleadings and other filings upon him is shown, so long as he remains counsel of record for Howard University Hospital. Failure to serve Mr. Schladt while he remains counsel of record in these proceedings shall result in the rejection for filing and/or the striking of any papers or other documents previously submitted for filing to the clerk of the CRB, without respect to whether Mr. Schladt has obtained them otherwise and without reference to any prejudice or lack thereof for the failure to properly serve said papers upon him.

Turning to the merits of the appeal, the specific mandate of the CRB to the ALJ on remand was set forth on the Order section thereof as follows:

> The award of 2% interest in connection with the award for reimbursement of out-of-pocket medical expenses is affirmed. The awards made with respect to travel expenses in the years 2000 through 2008 are affirmed. *The matter is remanded for further consideration of whether there are pending claims for travel expense mileage reimbursement for 2009, and if it is determined that such a claim has been presented, the ALJ shall consider it based upon the consideration of the record evidence relevant thereto and make or deny such an award as the law requires.*

Id., (italics added).

In the COR, the ALJ wrote the following in the "Analysis" portion:

> At the Formal Hearing of June 3, 2009, Claimant's Exhibits (CE) Nos. 1- 13 did not include medical/travel expense for the year 2009. 6/3/09 HT. Diligent search of the evidentiary submissions of the parties does not reveal a claim for mileage reimbursement for the year 2009 until October 7, 2009. On that date, Claimant filed a "Second Addendum – Request for Additional award due to ERRORS IN INITITAL ALJ GOVAN CALCULATED MEDICAL EXPENSE AWARD, RE: 03-287". Therein, the parking and mileage fees in 2009 are claimed to be $69.48. Claimant does not document the actual miles given. Diligent review of the record does not reflect any opposition to this specific claim for the year 2009.
> …
> Although Claimant has not submitted documentation to support her mileage claim for 2009, the undersigned is mindful of the humanitarian purpose of the Act and its implications. Accordingly, it is reasonable to extrapolate the mileage as between 10 and 12 miles, at the [published 2009] reimbursement rate of $0.55, with the remainder claimed amount attributable to parking fees.

> Claimant is entitled to an additional mileage reimbursement, for the year 2009, of $69.84.

Id., page 6.

From these portions of the COR, it appears that the ALJ found that a claim was made post hearing for mileage expense, but that Dr. Tagoe neither itemized the underlying bases for the claim, nor supplied or identified any documentation or testimonial evidence in support thereof. These findings are supported by substantial evidence and are affirmed.

The ALJ then relied upon the "humanitarian purposes of the Act", and "extrapolated" that Claimant drove between 10 and 12 miles to obtain medical care in 2009, and incurred the balance of the claim in parking fees.

The ALJ does not state from what she extrapolated these figures, and given the factual findings affirmed above, we can not see how any extrapolation is possible.

It is sometimes forgotten that liberally construing the Act in a claimant's favor, under the rubric of "the humanitarian purposes of the Act", has no application in circumstances other than those involving the statutory presumption of compensability. The court has written:

> […][P]etitioners argue that the examiner erred by invoking the humanitarian purpose of the workers' compensation statute to excuse Skeen's claimed violation of D.C. Code § 36-335(g). The Director, having based her decision on alternate grounds, declined to review this aspect of the hearing examiner's ruling. We find no error [in the Director's decision not to review that aspect of the ALJ's reasoning].
>
> When our cases speak of the "humanitarian purpose" of the statute, they refer specifically to the presumption of compensability, D.C. Code § 36-321(1) (1988), which enables a claimant more easily to establish his or her entitlement to benefits and is intended to favor awards in arguable cases. *See Ferreira v. District of Columbia Department of Employment Services,* 531A.2d 651, 655 (D.C. 1987). The reason for this presumption is simply that a worker's sole remedy for a work-related injury is the remedy provided by the statute; consequently, if the statutory benefits are unavailable for any reason, the worker will not be compensated at all for the injury. However, when it is undisputed that a claimant's injury arose out of his or her employment and is therefore compensable, "the presumption is no longer part of the case" because it is no longer necessary to effectuate the humanitarian purpose of the law. *Dunston v. District of Columbia Department of Employment Services,* 509 A.2d 109, 111 (D.C. (1986).
>
> There is no dispute in this case that Skeen's injuries arose from his employment. […] The humanitarian aspect of the statute --

> specifically, the presumption found in section 36-321 (1) -- relates to claims by an employee for benefits to be paid by his or her employer. Nothing in the statute suggests that this presumption is intended to facilitate recovery against third parties by either the employer or the employee. In a case such as this, the humanitarian purpose of the statute is essentially irrelevant.

4943, Inc. v. DOES, 605 A.2d 50 (D.C. 1992).

Likewise, nothing in the statute suggests that the presumption is intended to facilitate a claimant's attempt to establish entitlement to a specific amount of recovery. As has long and repeatedly been recognized it is a claimant's burden to establish entitlement to the level of benefits sought by a preponderance of the evidence. *Dunston, supra.*

As Howard argues in its Response to Application for Review, the ALJ found that there is nothing in the record to support the $69.48 award, and Dr. Tagoe has not directed us to anything in the record that the ALJ missed. Quoting from the Response:

> There is no evidence to support the award for $69.48 for mileage. The Employer is not required to voice opposition to every random claim made by the Claimant.
>
> This matter should *not* be remanded back to Judge Govan. Judge Govan has suffered enough. Dr. Tagoe has failed to present any evidence concerning any benefits due and owing for the year 2009.

Howard's response, page 4.

The award is unsupported by substantial evidence and is contrary to law, and must be vacated.

We would like for the matter to conclude administratively at this stage. The Act and the regulations appear to authorize us to do just that. D.C. Code § 32-1521.01 (d) provides that the CRB shall "(1) Review the Compensation Order for legal sufficiency; (2) Dispose of the matter under review by issuing an order affirming the compensation order; reversing the compensation order in whole or in part, and amending the order based on the panel's findings, or by remanding the order to the issuing Administrative Law Judge *for further review*" (emphasis added). In this case, no "further review" is required.

Also, 7 DCMR § 267.1(c) permits the CRB to amend compensation orders, and 7 DCMR § 7-267.5 states that such an amendment "shall only issue an amended compensation order where a remand to the Administrative Hearings Division […] would be unnecessary (e.g., where there is but one action that the Review Panel Decision would permit), and thus remand would be superfluous." Such is the case before us: the ALJ's finding that the record contains no evidentiary support for the amount of the award accurately describes the state of the record, and the ALJ cites only the irrelevant "humanitarian purposes of the Act" as a legal basis for that award.

We accordingly reverse the finding that Dr. Tagoe expended $69.48 in 2009 on mileage and parking related to obtaining medical care for her work related, and vacate the award.

We would like to take an additional step and issue an amended the COR such that the claim for relief is denied. However, the District of Columbia Court of Appeals, in *Washington Metropolitan Area Transit Authority and Juni Browne, Intervenor*, 926 A.2d 140 (D.C. 2007), (*Browne*), has cast some doubt as to the extent of that authority, writing:

> Although D.C. Code § 32-1521.01 provides that the CRB may amend a compensation order, this language does not authorize the CRB reverse an order of an ALJ denying compensation and in its place issue an award of compensation. [Footnote 10]. In cases where, as here, the CRB concludes that the ALJ's findings compel an award of compensation, it must remand the matter to the ALJ with instructions that the latter issue such an order. The decision by the CRB to award compensation must, therefore, be reversed and the matter must be remanded.

Browne, *supra*, at 148. The court in *Browne* also noted, in footnote 10, that:

> The term "amend" as used in the statutory provision allows for an alteration, revision, or correction in phraseology of the decision by the ALJ, without a change in the substance or essence of the decision. The CRB is restricted to affirming a compensation order, reversing it, amending the order, or remanding the matter to the ALJ for further action.

Id. Thus, where the CRB reverses or vacates a portion of a Compensation Order that is "substantitive" or "essential", we must return it to AHD to see to the correction, by instructing the ALJ to issue a new or amended Compensation Order containing the substantitive or essential correction. Accordingly, we remand this matter to the ALJ for issuance of a new Compensation Order on Remand denying the award.

CONCLUSION AND ORDER

The finding that Dr. Tagoe incurred the travel expenses claimed is unsupported by substantial evidence, and the award of those costs is therefore not in accordance with the law. The award of $69.48 for mileage reimbursement is reversed and vacated. The matter is remanded to the Administrative Law Judge with instructions that a Compensation Order be issued denying the claim.

FOR THE COMPENSATION REVIEW BOARD:

Jeffrey P. Russell
JEFFREY P. RUSSELL
Administrative Appeals Judge

September 17, 2013
DATE